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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 In re GOOGLE DIGITAL
4 ADVERTISING ANTITRUST LITIGATION

21 MDL 3010 (PKC)

Conference

5 New York, N.Y.
6 September 24, 2021
11:00 a.m.

7 Before:

8 HON. P. KEVIN CASTEL,

9 District Judge

10 APPEARANCES

11 BOIES SCHILLER FLEXNER LLP
12 Attorneys for Proposed Publisher Classes Plaintiffs
The Nation, The Progressive and Genius Media

13 BY: DAVID BOIES
14 PHILIP C. KOROLOGOS
-and-

15 KOREIN TILLERY LLC
16 BY: GEORGE A. ZELCS
-and-

17 BERGER MONTAGUE PC
18 BY: ERIC L. CRAMER
19 CAITLIN G. COSLETT

20 KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
21 Attorneys for Daily Mail Publisher Plaintiffs
Associated Newspapers and Mail Media

22 BY: JOHN THORNE

23 HERMAN JONES LLP
24 Attorneys for Newspaper Publisher Plaintiffs
Emmerich, HD Media, Coastal Point, Journal,
25 ECENT, Clarksburg, Flag, Eagle, AIM Media Midwest,
AIM Media Texas, Gale Force,
AIM Media Indiana and Brown County
BY: JOHN HERMAN
SERINA M. VASH

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APPEARANCES CONTINUED

W. MARK LANIER

-and-

ASHLEY C. KELLER

Attorneys for State Attorneys General Plaintiffs

COOPER & KIRK, PLLC

Attorneys for Plaintiff State of Montana

BY: DAVID H. THOMPSON

ZWERLING, SCHACHTER & ZWERLING, LLP

Attorneys for Plaintiffs

SPX, SkinnySchool and Mint Rose

BY: FREDERICK T. ISQUITH, Sr.

FREDERICK T. ISQUITH, Jr.

MOGIN RUBIN LLP

Attorneys for Cliffy Care Plaintiffs

BY: JONATHAN L. RUBIN

JENNIFER M. OLIVER

GIRARD SHARP LLP

Attorneys for Advertiser Class Plaintiffs

Hanson Law Firm, Surefreight and Lindo

BY: SCOTT M. GRZENCZYK

-and-

ADHOOT & WOLFSON, PC

BY: BRADLEY K. KING

-and-

TAUS CEBULASH & LANDAU

BY: ARCHANA TAMOSHUNAS

WILSON SONSINI GOODRICH & ROSATI, P.C.

Attorneys for Defendants Google, Alphabet and YouTube

BY: JUSTINA K. SESSIONS

JONATHAN M. JACOBSON

-and-

FRESHFIELDS BRUCKHAUS DERINGER LLP

BY: ERIC MAHR

ROBERT McCALLUM

-and-

AXINN, VELTROP & HARKRIDER LLP

BY: JOHN D. HARKRIDER

CRAVATH, SWAINE & MOORE LLP

Attorneys for Defendant Facebook

BY: KEVIN J. ORSINI

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(Case called)

THE COURT: All right. There should be three people at the front table.

MR. GRZENCZYK: Your Honor, if I may?

I'm Scott Grzenczyk from Girard Sharp. We represent the advertising class.

THE COURT: That's great. That's terrific. This has nothing to do with who you represent. This happens to have to do with the pandemic, so there are three people at the front table.

MR. THORNE: John Thorne for Daily Mail.

THE COURT: Please remain seated. Again, that's another pandemic condition that we have. OK?

I think I indicated that there should be two representatives of the states and one representative of the publisher classes at the front table. Did I not? I think I did.

Do you represent the state?

MR. THORNE: Your Honor, I represent Daily Mail, and thank you for taking this case. I'm going to move to the back, and Mr. Boies will represent the publisher class action at this table.

THE COURT: Thank you.

Mr. Boies, who do you represent?

Remain seated.

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1 MR. BOIES: Excuse me.

2 THE COURT: I know. It's a bad habit. We all have to
3 get used to these things.

4 MR. BOIES: The publisher class.

5 THE COURT: OK.

6 MR. LANIER: Mark Lanier. I represent the states,
7 your Honor.

8 MR. KELLER: I represent the states as well, your
9 Honor.

10 THE COURT: Terrific. That's exactly the way I had it
11 set up for the front table. Thank you.

12 Now, for the back table, I assume you represent
13 Google. Is that correct?

14 MR. MAHR: That's correct, your Honor. Eric Mahr on
15 behalf of Google.

16 THE COURT: All right. Good to see you.

17 MS. SESSIONS: And Jessica Sessions, your Honor, on
18 behalf of Google.

19 MR. ORSINI: Good morning, your Honor. Kevin Orsini
20 on behalf of Facebook.

21 THE COURT: All right. Thank you.

22 MR. RUBIN: Good morning, your Honor. Jonathan Rubin
23 on behalf of the Cliffy Care plaintiff.

24 THE COURT: All right.

25 MR. ISQUITH JR.: Fred Isquith on behalf of the SPX

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1 plaintiffs.

2 MS. VASH: Good morning, Judge. Serina Vash on behalf
3 of HD Media and 12 additional newspaper plaintiffs.

4 THE COURT: All right. Good to see you, Ms. Vash.

5 MR. GRZENCZYK: Your Honor, Scott Grzenczyk on behalf
6 of the advertiser class. We were not on the initial papers, so
7 we were --

8 THE COURT: Understood. Who is your client?

9 MR. GRZENCZYK: The advertiser class.

10 THE COURT: Well, which? There are three advertiser
11 class actions, so which one are you?

12 MR. GRZENCZYK: The digital advertising class action
13 from the Northern District of California.

14 THE COURT: What is the name of the putative class
15 representative?

16 MR. GRZENCZYK: The Hanson Law Firm is one of the
17 class representatives. The case was styled *In re Digital*
18 *Advertising Antitrust Litigation*.

19 THE COURT: No. The last time I checked, under
20 Federal Rules of Civil Procedure, there must be a plaintiff who
21 is styled as the class representative. It's not a class action
22 until the class is certified. Now, there is SPX and Skinny.
23 There's Cliffy Care, and there's Surefreight. Are you any of
24 those?

25 MR. GRZENCZYK: Surefreight is part of our class.

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1 THE COURT: All right.

2 MR. GRZENCZYK: Surefreight is one of our main class
3 representatives along with the Hanson Law Firm.

4 THE COURT: The Hanson Law Firm is a named class
5 representative.

6 MR. GRZENCZYK: Yes. Judge Freeman in the Northern
7 District of California previously consolidated several class
8 actions, styled them *In re Digital Advertising Antitrust*
9 *Litigation*. Hanson Law Firm, Surefreight are among the named
10 plaintiffs in that class action.

11 THE COURT: All right. So a law firm is one of the
12 class representatives.

13 MR. GRZENCZYK: Yes, your Honor.

14 THE COURT: OK. So it's the Hanson Law Firm,
15 Surefreight. And who is the other class representative?

16 MR. GRZENCZYK: Those are the two primary class
17 representatives.

18 THE COURT: All right. Surefreight and Hanson.
19 Sir.

20 MR. KING: I'm with Mr. Grzenczyk. Bradley King,
21 Adhoot Wolfson, also for the advertiser class case. Vitor
22 Lindo is the third named plaintiff in the class.

23 THE COURT: Lindo. OK. For today's purposes, I'm
24 going to refer to that case as the Surefreight case.

25 MR. GRZENCZYK: Thank you, your Honor.

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1 THE COURT: OK.

2 MR. KOROLOGOS: Good morning, your Honor. Phil
3 Korologos of Boies Schiller Flexner for the publishers.

4 THE COURT: OK.

5 MR. ZELCS: Good morning, your Honor. George Zelcs of
6 Korein Tillery for the publishers.

7 THE COURT: All right.

8 MR. THORNE: Good morning again, your Honor. John
9 Thorne for the Associated Newspapers a/k/a Daily Mail.

10 THE COURT: All right.

11 Anyone else representing a party? Raise your hand,
12 and we'll call on you if you're representing a party and making
13 an appearance today.

14 Yes, sir.

15 MR. THOMPSON: Good morning, your Honor. David
16 Thompson for the state of Montana.

17 THE COURT: Thank you, Mr. Thompson.

18 In the front row.

19 MR. CRAMER: Good morning, your Honor. Eric Cramer
20 from Berger Montague for the publisher class.

21 THE COURT: OK.

22 Yes, ma'am.

23 MS. COSLETT: Caitlin Coslett, Berger Montague, also
24 for the publisher class.

25 THE COURT: All right. Just say your name again. I

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1 didn't quite hear it.

2 MS. COSLETT: Caitlin Coslett.

3 THE COURT: All right. Thank you.

4 Yes, ma'am.

5 MS. OLIVER: Jennifer Oliver, Mogin Rubin, for the
6 Cliffy Care plaintiffs, your Honor.

7 THE COURT: OK. Cliffy Care. Yes.

8 And, yes.

9 MS. TAMOSHUNAS: Your Honor, Archana Tamoshunas, also
10 with the Surefreight plaintiffs.

11 THE COURT: All right. We're not picking up your
12 name. Who do you represent?

13 MS. TAMOSHUNAS: I'm with Mr. Grzenczyk, the
14 Surefreight plaintiffs.

15 THE COURT: All right.

16 Could you say the name, sir, because we're having an
17 audibility issues with the masks.

18 MR. GRZENCZYK: Archana Tamoshunas.

19 THE COURT: All right. Thank you.

20 Anyone else representing a party making an appearance?

21 I see in the back of the courtroom, yes, sir. Hand
22 raised high. Remain seated.

23 MR. JACOBSON: Jonathan Jacobson, Wilson Sonsini,
24 cocounsel for Google.

25 THE COURT: All right.

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Yes, sir.

MR. HARKRIDER: John Harkrider, representing Google.

THE COURT: Representing.

MR. HARKRIDER: Google.

THE COURT: Thank you.

MR. McCALLUM: Rob McCallum, Freshfields, cocounsel
for Google.

THE COURT: All right. Excellent.

Anyone else making an appearance on the record here
today?

Wonderful.

Well, I think with the exception of the Associated
Newspapers lawyer, no one else in this courtroom expected to be
before me, and I didn't expect to have you before me. From
what I can tell from the filings before the MDL, I was not
anybody's first choice, and I don't feel at all insulted
whatsoever. I was sitting there looking at the filings and
saying, Well, I don't have to worry about this case, because
this is obviously going elsewhere. And if it's any
consolation, I was rooting for you all. But that's not the
hand of cards that were dealt you or me, so we're together.

I have something of an agenda, and I'll tell you what
the agenda is so that you'll know that your issue is at some
point going to be addressed, or you'll tell me it's not.

First, we're going to talk about pleadings and motions

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1 to dismiss. Then we're going to talk about discovery: stay, no
2 stay; whether there's access to some portion or all of the CID
3 discovery. And then we'll talk about organizational issues.
4 In that context, I will have you talk about the issues
5 associated with Associated Newspapers, the Daily Mail, of which
6 there are some unique issues that have to be aired in this
7 case. We'll talk about structure, organization, leadership, so
8 on and so forth.

9 Then on my agenda, there is the issue of what I'll
10 call the *Lugosch* issue, the redactions from the second amended
11 complaint. We'll talk about that as well.

12 That's the agenda.

13 With regard to pleadings and motions, some of this
14 I've already set in motion and is on a path. The state
15 plaintiffs have now filed their second amended complaint.
16 Google has until September 30 to file their premotion letter,
17 and Google's time -- I'll say this for the sake of good
18 order -- to respond to Counts Five and Six, which are state law
19 claims in the state complaint, are stayed pending further
20 order.

21 Any objection, Mr. Lanier?

22 MR. LANIER: No objection, your Honor.

23 THE COURT: All right. And then what will happen next
24 is the state plaintiffs will respond. I'm kind of guessing
25 there's going to be a premotion letter.

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1 Am I guessing right?

2 MR. LANIER: You are, your Honor.

3 THE COURT: All right. It was a good guess.

4 Then the plaintiffs will respond on October 8,
5 indicating if there are any amendments they wish to make. The
6 idea is to get the strongest and best pleading in front of the
7 Court so Google can make its motions and so that we don't have
8 this tennis match of rulings on motions followed by amendments
9 followed by further motions and further rulings, etc. This
10 should be the plaintiffs' strongest and best pleading.

11 Now, the defendants' time to answer or move with
12 regard to all other complaints I propose to stay. The thought
13 here, just so all cards are faceup on the table -- this is not
14 gamesmanship or anything; it's my view of efficiency -- is we
15 take one of the several complaints. I could have taken the
16 publishers class action, I could have taken the Associated
17 Newspapers, but I've taken the states' complaint because it
18 seems to cover not all of the waterfront but much of the
19 waterfront. And if we know that it does state a claim or
20 doesn't state a claim or states a claim on one of your federal
21 antitrust claims but not on others, we'll know where we are.

22 Other plaintiffs -- in class actions, in individual
23 actions -- will have time to seek an amendment, not a lot of
24 time but time after you have in hand a decision on the motion
25 to dismiss in the state case, to then say, Well, gee, I want to

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1 amend to add an allegation that was upheld in the state case,
2 or the like. So you'll have a chance. You're looking at each
3 other's pleadings.

4 I am not putting a lot of stock in the fact that today
5 someone raises only a Jedi Blue claim but not another claim,
6 because these things may change over time.

7 That's the process. So what I envision is 21 days
8 after the decision on the motion to dismiss, there will be an
9 opportunity for amendments and when I say amendments, move to
10 amend. I'll have you submit a proposed pleading so everybody
11 knows what the amendment is. I expect that there should be
12 consent to the amendments. Maybe there won't be, in which
13 event I'll rule, but we'll then have the pleadings in the other
14 cases fixed, and I'll fix a motion schedule.

15 As I indicated in, I think, pretrial order No. 1, I
16 likely will continue a stay as to state claims. It's a
17 question of prioritization of work; it is not the case that
18 multiple motions going on at the same time lead to faster or
19 more efficient results. You're dealing with one judge, one
20 chambers, and I could be a bottleneck if I were trying to
21 resolve every pleading in every case and every state law claim.
22 Let's find out whether we have a federal antitrust claim before
23 we get into the state law claim.

24 With regard to discovery, I'll say this. My present
25 thinking is that if I find that one or more of the claims in

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1 the complaint states a claim for relief, the antitrust claims,
2 I will likely allow discovery to commence. I will not wait for
3 the briefing on the various motions to dismiss. If I have a
4 pleading, the state pleading, that passes muster, that gives me
5 the confidence that there will be other pleadings that pass
6 muster. Therefore, the stay of discovery can at that point be
7 dissolved, which means that plaintiffs' counsel in the various
8 cases need to be thinking soon about how to organize all that
9 discovery.

10 The reality is everything is integrating with
11 everything else here. I started off telling you about motions
12 to dismiss, but that blends into the stay, which blends into
13 organization and the plaintiffs' bar getting their act together
14 with differing interests to figure out an organized plan,
15 because it's no surprise that we're not going to take or have
16 the depositions taken of the same executives seriatim in a raft
17 of cases, certainly not 19 cases but not even four cases.

18 There can be instances where a lead counsel overlooked
19 or failed to examine on a very key point and there's some need
20 for supplemental examination of a witness. I get it. We'll
21 deal with that when that arises, but there will be one time for
22 general document production -- I'm putting aside the CID issue,
23 which I'll talk about in a minute -- one time for document
24 production and one set of depositions.

25 Now, there may be witnesses that the publisher class

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1 or the state says I have no interest whatsoever in this witness
2 because it really relates only to advertiser claims and only
3 the advertisers are interested in this deposition. There's
4 room for that in any good schedule, but there's certainly
5 plenty of overlap. And the overlap exists even if the legal
6 theories are not perfectly aligned. There is enough factual
7 common matter.

8 So let's just take it, with regard to pleadings and
9 stay of discovery but not including CID, because I need to get
10 some more information from you this morning. But on those two
11 subjects, are there any comments, objections, questions?

12 MR. RUBIN: Thank you, your Honor.

13 We appreciate the amount of time and thought that your
14 Honor obviously has put into a complex matter. And also, to
15 the extent the Court was referring to Cliffy Care in stating
16 that it doesn't really matter if there's only a specific claim
17 in the complaint, I think that the important thing is not the
18 absence of other claims, as far as our case is concerned, but
19 the specificity of the claim that we do have, and we agree that
20 the states' case largely covers the waterfront, but it does not
21 cover the specifics of the Section 1 claim that is alleged in
22 Cliffy Care.

23 There is a Section 1 claim that is related to
24 monopolization, a Section 1 claim in a larger collusion case,
25 but none of the other complaints are seeking specific damages

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1 for the injured class related to the operation of the agreement
2 itself.

3 THE COURT: The network bidding agreement.

4 MR. RUBIN: Correct. Yes, your Honor.

5 THE COURT: All right. But that may change, right?

6 MR. RUBIN: It's a bit unsatisfactory if we wait for
7 the pleadings from the state case because it does not shed any
8 light on our pleadings, which go into greater specificity on
9 the damages claim related to the network bidding agreement.

10 THE COURT: But that may change, right?

11 MR. RUBIN: That may change.

12 THE COURT: Because other plaintiffs may incorporate
13 some aspect of your claim.

14 MR. RUBIN: Well, that's right, your Honor.

15 THE COURT: And you may choose to bring your claim.

16 MR. RUBIN: Indeed, but if we're going to cover the
17 waterfront, and I think that's very logical, with respect to
18 pleadings, then it should be a complete set of issues. And if
19 the state proceeds on its own, I think there's a little gap,
20 and that's basically our point. We would like to --

21 THE COURT: Well, thank you.

22 MR. RUBIN: Yes.

23 THE COURT: But there's a big gap. I disagree with
24 you. There's not a little gap, but there's a big gap. So one
25 of the elements on a monopolization claim, I believe, is in

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1 addition to antitrust injury or harm to competition, there must
2 also -- not in the state case but in the private cases -- be
3 harm to the competitor.

4 What I've set up here does not encompass that. You
5 will not know when you get a decision on the state case whether
6 or not any of you have successfully alleged harm to a
7 competitor. That's a big gap. I realize that, and there may
8 be a gap as to your pleadings. I know the Jedi Blue or the
9 network bidding agreement is referred to in the state's
10 complaint.

11 Is that correct, Mr. Lanier?

12 MR. LANIER: Yes, your Honor, it is.

13 THE COURT: And what do you say about it or how does
14 that factor into your case, briefly?

15 MR. LANIER: Your Honor, basically, it is our
16 contention that the Facebook agreement on Jedi Blue was one
17 which allowed Google's plan to, in a sense, go unchallenged.

18 THE COURT: All right.

19 MR. LANIER: And we have not chosen to sue, at this
20 point, Facebook. But we certainly make all of the same
21 allegations. We're just going after Google for that end.

22 THE COURT: Right. Did you allege it's *per se*
23 violation?

24 MR. RUBIN: Well, we don't specifically characterize
25 it, but your Honor, our allegation is that the operation of the

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1 agreement has caused money damages to a particular class.

2 THE COURT: Understood.

3 MR. RUBIN: Which is considerably distant from the
4 idea that the agreement was a contribution to collusion in a
5 larger industrial context.

6 THE COURT: Understood.

7 MR. RUBIN: So our request would be that we be
8 allowed, along with the states, on the pleadings, since our
9 pleadings are at least at this point extremely narrow on this
10 one count, on this one theory, that the states' case, in
11 essence, be supplemented with the Cliffy Care allegations so
12 that indeed there is a complete covering of the waterfront.

13 THE COURT: Thank you.

14 MR. RUBIN: Thank you, your Honor.

15 THE COURT: Yes, sir.

16 MR. ISQUITH JR.: Your Honor, my comment is on the
17 discovery plan and the discovery stay. Given your process that
18 you would like to proceed with, the states going forward and
19 then an amended pleading by the plaintiffs' group afterwards,
20 it's our thought that at least for the discovery that has been
21 provided, we know that Google --

22 THE COURT: The CID stuff.

23 MR. ISQUITH JR.: But there's also -- according to
24 some of these letters, there's been discovery outside of the
25 CID that Google has provided -- I believe it's outside the CID,

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1 that Google has provided to the advertisers class as well as
2 the publishers class, that that be provided to all the private
3 plaintiffs' groups so we can start our review to ensure that
4 those documents get into everyone.

5 THE COURT: Thank you. I'm going to ask Google about
6 that and I'll ask you some further questions, Mr. Isquith,
7 because I failed to appreciate that that was the case. I
8 thought it was just the CID. I didn't realize that there was a
9 production to the advertiser class.

10 I see Google wanting to respond there.

11 MS. SESSIONS: Your Honor, I'm happy to also address
12 that at the point that you ask us questions.

13 THE COURT: OK.

14 MS. SESSIONS: Google has not made a production to the
15 advertiser or plaintiff classes of any materials outside of the
16 CID in this case.

17 THE COURT: OK. All right. Thank you.

18 I heard that representation, Mr. Isquith.

19 MR. ISQUITH JR.: Thank you, your Honor. I was taking
20 it from the letters, and I was not aware that it was just the
21 CID.

22 THE COURT: OK. That's fine. Thank you.

23 Yes, sir.

24 MR. GRZENCZYK: With respect to the Surefreight
25 plaintiffs, just commenting briefly on something your Honor

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1 mentioned, which is that for other plaintiffs, other than
2 Cliffy Care, people are evaluating the Jedi Blue agreement, how
3 that fits into their case. Your Honor's assessment is
4 accurate.

5 The posture of our case when the (inaudible) happened
6 is we were in the process of looking to amend our complaint,
7 and certainly how Jedi Blue fits in was one of the things that
8 we were considering. So just noting for your Honor that your
9 characterization is right, that there are plaintiffs out there
10 looking to amend their complaints and what exactly those
11 amendments will include is an ongoing process.

12 THE COURT: All right. Thank you.

13 Mr. Boies.

14 MR. BOIES: Your Honor, I think that with respect to
15 the documents, I think there is CID documents, but I also think
16 there has been production to the states that's in addition to
17 the CID documents.

18 THE COURT: I'm going to find out about that. That's
19 an interesting point as well. I'm going to find out about
20 that. I know that the production -- I'm viewing it as the CID
21 production -- is some 700,000 documents. There were 20 third
22 parties, I understand, and something like 54 examinations.
23 Now, if there is more than that, we're going to find that out
24 this morning and deal with it.

25 MR. BOIES: OK.

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1 THE COURT: I don't know what the answer's going to
2 be, but we'll find out if that's the case.

3 Thank you.

4 Mr. Lanier.

5 MR. LANIER: Yes, your Honor.

6 You've already nailed the numbers. I was going to
7 throw the numbers out there, but you've got them. In addition
8 to that, we have been provided over 2 million documents from
9 Google. That's in addition to the 700,000 you were referencing
10 as the CIDs with the third-party interviews. We did have a
11 protective order basically in place with Google and, if the
12 Court should decide it's OK to do, we can certainly issue those
13 documents to others.

14 In addition, there's a tranche of documents that the
15 DOJ has in the DOJ case, and our hope would be, if the Court
16 deems it appropriate, that in light of the protective order in
17 place, if we could have access to those documents even while
18 the briefing's going on, it would enable us if Google could
19 just, like, click a button, cut and paste and give us the same
20 production it gave the DOJ, it would enable us to be going
21 through those documents and investing our time and energy. And
22 of course, if we wind up with no claim, we've wasted our time
23 and energy, but not anyone else's.

24 THE COURT: All right. OK. Thank you, Mr. Lanier.
25 I'm going to get into that as well.

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1 Right now I'm principally concerned, is there any
2 other comment on the approach on pleadings and the tentative
3 view that there will be, or at least I'll say the view that
4 there will be a stay of general discovery, carving out what we
5 just discussed about documents that have already been
6 produced -- for discussion; I haven't made any decision -- but
7 that general discovery would be stayed until after the motion
8 to dismiss on the state plaintiffs' complaint is decided.

9 Yes, Ms. Vash.

10 MS. VASH: Thank you, your Honor.

11 I just want to clarify with respect to some of the
12 other comments that were made. There is a subset of documents,
13 is our understanding, that have been produced to the publisher
14 class action and the advertiser class action. And as respects
15 the direct actions, the newspaper plaintiffs in some of the
16 other cases, we have reached out to counsel for Google and
17 asked that they also provide that to us so that we are all on
18 the level playing field as we move forward.

19 Google's declined to do that, and we would request
20 that of the Court as we go forward today.

21 THE COURT: Thank you, Ms. Vash.

22 MS. VASH: Thank you, your Honor.

23 MR. GRZENCZYK: We understand the Court's position on
24 the overall discovery stay with respect to document productions
25 and depositions. What we've found effective in other cases

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1 where that type of discovery is stayed is for the Court to
2 nonetheless authorize or suggest to the parties that they
3 commence with negotiating discovery-related pretrial orders.
4 Protective order is an example. ESI protocol is an example. I
5 think there's a lot we can accomplish if the Court's inclined
6 to say actual document productions that will allow us to really
7 hit the ground running once that discovery stay is lifted.

8 So our suggestion, respectfully, would be that the
9 Court have the parties go forward, meet and confer and
10 negotiate, and if we have disputes about the terms of pretrial
11 orders related to discovery, we can present those in advance of
12 the discovery stage to you.

13 THE COURT: All right. That's a very good idea, but
14 I'm going to have that idea implemented when we get a little
15 bit of an organizational structure in place, and maybe there
16 will be something tentative in that direction before we break
17 today.

18 MR. GRZENCZYK: And just to advise the Court, some of
19 those discussions among some of the counsel have already
20 started. So we've already begun making progress and are happy
21 to do that with an organization in place.

22 THE COURT: All right.

23 Anything else?

24 Now, let me hear from Google in the first instance.

25 I have heard about the 700,000 documents that are part

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1 of the CID production, which I gather is not all Google
2 documents. I would assume that's the universe of everybody who
3 produced documents. I've heard about 2 million documents
4 produced by Google. I've heard about possible productions to
5 the advertiser class and to the publisher class. So let me ask
6 you to tell me what has happened, first of all, so I understand
7 what Google has produced and to whom.

8 MR. MAHR: Thank you, your Honor.

9 Ms. Sessions and I both represent Google -- I in the
10 Texas case and Ms. Sessions in the private cases. We're now
11 combined, obviously. I have the easier job of talking about
12 our views on the pleadings. We agree with your proposal on the
13 pleadings, and I haven't heard anyone disagree with it.

14 Ms. Sessions will handle our position on the stay.

15 But counsel in the Texas case, just so it's clear,
16 there were 2 million documents produced by Google in that
17 investigation. The 700,000 documents are from a third party in
18 that investigation.

19 THE COURT: I see.

20 MR. MAHR: And then some 50 some interviews of third
21 parties.

22 THE COURT: All right. Thank you.

23 Now, let me hear about what has been produced in any
24 of the other cases.

25 MS. SESSIONS: Yes. Thank you, your Honor.

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1 Before the cases were transferred to your Honor, Judge
2 Freeman, in the Northern District, ordered that Google
3 re-produce the 2 million documents that were part of the
4 investigative production to Texas to counsel for the advertiser
5 and plaintiff classes in those cases, and Google has done that.
6 So that's the full scope of document production that Google has
7 made.

8 THE COURT: And that's in the advertiser --

9 MR. LANIER: Both the publisher and the advertiser
10 class cases.

11 THE COURT: All right. OK.

12 Now, in olden times, which some of you may remember,
13 when there were situations like this, there were document rooms
14 set up and there was one set of paper files and counsel could
15 come in and tag what they wanted copied, maybe send out to be
16 copied, etc., and a judge would be concerned and the producing
17 party would be concerned that there be one location where folks
18 could go for the production.

19 Now, with electronic production, those concerns are
20 not quite the same, but why should it not be the case that,
21 subject to a protective order in this case, an expanded
22 protective order, why ought I not order Google to produce that
23 which has been produced to the publisher and advertiser classes
24 in Judge Freeman's case to all of the plaintiffs?

25 Now, I have to be guided on how that's done so as not

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1 to burden you. I know you won't be copying 2 million pieces of
2 paper 20 times, but that's basically the question I have. Why
3 should you not be ordered to have a repository, maybe a
4 website, secure website where folks can go and get the
5 documents now?

6 MS. SESSIONS: Your Honor, I'll take on the substance
7 first, and then we can talk a little bit, I guess, about what
8 procedural --

9 THE COURT: Right.

10 MR. LANIER: -- what procedures might be in place.

11 The civil investigative demand that was issued to
12 Google by the states was broad. There were a lot of documents
13 produced in response, and Google does not want to or feel that
14 it should have to have those confidential documents spread
15 around -- more fruits of Google's customers and in many cases
16 its competitors -- before those complaints have been tested,
17 and at least tested with respect to the common allegations in
18 the Texas complaint, because if there are certain categories of
19 claims that are not going to go forward, Google should not have
20 to provide the documents that are relevant solely to those
21 claims that are not going forward.

22 So that's why we don't think that we should have to
23 turn over that entire set of documents at this time. However,
24 if there are some claims that do end up going forward after
25 your Honor rules on the motions to dismiss, that production

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1 could be done reasonably quickly if discovery were to be open,
2 because as your Honor observed, these things are done
3 electronically these days. And so we could get other folks up
4 to speed as appropriate reasonably quickly if there are claims
5 that are going to go forward.

6 THE COURT: All right.

7 Anyone want to be heard on why the Court should order
8 the production made to the state and to the publisher and
9 advertiser class actions, at least in the Northern District of
10 California, at this time?

11 Ms. Vash, then Mr. Boies.

12 Go ahead.

13 MS. VASH: Thank you, your Honor.

14 As an initial matter, it's our understanding that
15 there is a subset of documents that has been produced to the
16 publisher and advertiser class actions.

17 THE COURT: Pause.

18 I thought I heard that the universe was produced.

19 MS. SESSIONS: Your Honor, the universe of documents
20 that Google produced has been re-produced. Google did not
21 produce any third-party documents.

22 THE COURT: Understood. Understood. I didn't think
23 you did. OK.

24 Go ahead, Ms. Vash.

25 MS. VASH: Those documents would be and are subject to

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1 a protective order that any plaintiff in this case would also
2 be subject to, Judge. And pursuant to this Court's order, the
3 August 13 order where you requested that we work together in
4 doing things such as discovery and serving of motion practice
5 and expert witnesses, etc., it would be most efficient, Judge,
6 and in line with this Court's order to assure that all
7 plaintiffs are on a level playing field and have access to
8 those documents at this time, your Honor.

9 THE COURT: Thank you.

10 Mr. Boies.

11 MR. BOIES: From our perspective, your Honor, we would
12 like to have access to all of the documents that the state has,
13 whether they were produced by third parties or by Google.
14 We're prepared to take them pursuant to a protective order. If
15 there are documents that raise particular confidentiality
16 concerns, we are prepared to take them on an attorney's eyes
17 only basis at this point, but we think that it would be
18 appropriate for us to, at this stage, at least get the
19 documents that are already in the possession of the state
20 plaintiffs.

21 THE COURT: Thank you.

22 Let me hear from Ms. Sessions on another topic that
23 was raised.

24 There is said to be some set of documents that were
25 produced to DOJ. What are they, and how do they differ from

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1 what's been produced to the state and certain plaintiffs so
2 far?

3 MS. SESSIONS: Your Honor, the United States
4 Department of Justice has publicly announced a broad-ranging
5 investigation into Google that culminated in the filing of a
6 lawsuit that's now pending in the District of Columbia. That
7 primarily concerns Google's search business and not the display
8 advertising business that is at issue in these cases. So it is
9 our view that any documents that were produced to the
10 Department of Justice as a part of that broad investigation are
11 not necessarily or even probably relevant to this case, and we
12 should address any future document productions after discovery
13 actually gets underway and with properly targeted requests for
14 production rather than a request for wholesale re-production of
15 materials that were produced in an investigation that
16 culminated in a lawsuit that is different than this one.

17 THE COURT: OK.

18 Sir.

19 MR. THORNE: Your Honor, there is actually an
20 additional DOJ investigation of (inaudible) going on now and
21 CIDs from DOJ to third parties -- and I don't know if it's
22 Google or not, because they're third parties -- separate teams
23 beyond the search team that filed the existing case. If DOJ
24 has collected useful things that would make this MDL more
25 efficient and go faster and have already been produced, I would

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1 include those in the bucket of things to be accessed.

2 I'll also say that Daily Mail was one of the third
3 parties that provided documents to Texas, and therefore, Daily
4 Mail's documents have been marked which are confidential or not
5 confidential and turned over to Google. There is a universe of
6 potentially useful third-party information that ought be part
7 of the access bucket.

8 THE COURT: Thank you.

9 All right. Anyone else?

10 Yes, sir.

11 MR. ORSINI: Good morning, your Honor.

12 Facebook, as your Honor knows, is a relative newcomer
13 to some of these actions, not quite as new as your Honor but a
14 relative newcomer.

15 We completely support the Court's proposal on the
16 schedule and briefings and all those issues. I just wanted to
17 respond briefly to the point Mr. Boies made and Mr. Thorne has
18 repeated about third-party productions to Texas as part of the
19 investigation. We have not produced any documents in any of
20 these litigations. Facebook was one of the third parties who
21 produced documents as part of the CID, and I think for many of
22 the reasons that Ms. Sessions noted, including the fact that
23 Facebook has not had any of the complaints against it subject
24 to any test yet by this Court or any other, that it would be
25 premature to have Facebook's third-party documents produced in

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1 front of Texas and the CID now produced to all these plaintiffs
2 at this time.

3 THE COURT: Thank you.

4 MR. ORSINI: Thank you.

5 THE COURT: All right. Let me tell you what I'm going
6 to do.

7 I start from some experience, having done things a
8 different way and allowing discovery to go forward during a
9 motion to dismiss. Occasionally there's good reason to do
10 that, and there are serious downsides at times in doing that.
11 It's not just even prejudice to the defendants, but the
12 pleadings become moving targets. If I were writing on a clean
13 slate, which I'm not, I might be thinking about a stay pending
14 a decision on the states' motion to dismiss, but that's not the
15 status quo I have here. So I am going to order the parties to
16 negotiate a protective order and I'm going to require Google to
17 produce, subject to that protective order, the documents that
18 have been produced by Google to the state of Texas and to
19 certain class action plaintiffs in this case, and that it be
20 done in -- certainly it should be done within 30 days of the
21 entry of a protective order. So it behooves folks to negotiate
22 that protective order, and we'll talk about organization in a
23 little while.

24 I am not going to order the production of third-party
25 documents, examinations conducted by the state plaintiffs,

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1 documents produced by Google to DOJ. It's restricted to what
2 I've said at this stage of the game. And when you all finish
3 reading the 2 million documents, come back to me and I'll see
4 about letting you read some more. OK? That should keep
5 everyone occupied for a while.

6 MS. SESSIONS: Your Honor, if I may?

7 THE COURT: Yes.

8 MS. SESSIONS: Just one point of clarification. We
9 appreciate and understand your Honor's guidance on this
10 subject. Google may have defenses to some of the private
11 complaints that are pleading defenses, and I just want to make
12 sure that Google's production of documents pursuant to your
13 Honor's order will not be construed as a waiver of any of those
14 defenses that we may have at the time that we would move to
15 dismiss those.

16 THE COURT: They are not a waiver.

17 MS. SESSIONS: Thank you, your Honor.

18 THE COURT: OK. Thank you for that.

19 Anyway, defendants' time to answer on all other
20 complaints is stayed. Having heard Cliffy Care on this, I'm
21 going to proceed in the fashion which I outlined on the motions
22 to dismiss and have the stay of discovery, except for that
23 which I ordered. And as I indicated, even though Google and
24 Facebook may have unique defenses to individual actions, I will
25 likely allow general discovery to go forward a reasonable

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1 period of time after the decision on the motion to dismiss.

2 Now, with regard to organization, I can't get you
3 organized entirely on my own. I probably could; you wouldn't
4 like it very much. So it does seem to me that what we need to
5 have happen is, in the short term, a meeting at which a
6 reasonable number of representatives, maybe two from the state,
7 and representatives from the publisher class action --

8 There's only one publisher class action, is that
9 right, Mr. Boies?

10 MR. BOIES: Yes. One publisher class action, two
11 classes within it.

12 THE COURT: Two classes within it. Got it.

13 And then we have 13 of the 14 individual publisher
14 actions represented by the Herman Jones firm. Is the 14th the
15 Associated Newspapers case?

16 MS. VASH: Yes, sir, it is.

17 THE COURT: All right. Well, we'll talk about that in
18 a moment.

19 So it would be representatives from the state case,
20 the publisher class, the Herman Jones law firm and, for the
21 moment, from the three advertiser class actions.

22 The three advertiser class action counsel don't have
23 to be happy about anything that's gone on so far in this case,
24 but they need to be accepting of where they are, and the
25 advertiser class actions need to get together in a room and

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1 talk, because what happens is, ultimately, if you're not able
2 to speak with approximately one voice on issues, I will have to
3 put some sort of a structure in place. I would rather you work
4 on that on your own, but there should also be representatives
5 of the advertiser class actions.

6 That is not the most unmanageable sized group I've
7 ever heard of in an MDL kind of a context. You should be able
8 to sit around a reasonably sized conference table and talk.
9 And yes, I think it's fair for you to work up ESI protocols,
10 even a Rule 34 demand. I'm not opposed to your having to seek
11 leave from me. If there is a consolidated Rule 34 demand that
12 you want to serve, the time to respond is going to be stayed,
13 but the clock will be ticking so that Google will not be able
14 to say, My God, I just got this on Tuesday and it's going to
15 take me months to figure out what's within the scope of this,
16 etc. But it will at least enable you to start the process of
17 negotiating the scope of a Rule 34 demand and to discuss that.

18 Now, I didn't give you permission to serve a Rule 34
19 demand. I'm encouraging you to discuss it and see whether you
20 can come to an agreement. And if you come back and say:
21 Judge, we're all on board. We have 19 Rule 34 demands that
22 each of us wants to serve, and there might be a little overlap
23 here or there, that's not going to happen. So it behooves you
24 to try and get on the same page so we can make progress on
25 that.

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1 I'm going to deputize Mr. Lanier and Mr. Boies to
2 figure out when and where, whether you do it in person or by
3 Zoom, or however and report back.

4 Mr. Lanier is sub-designating Mr. Boies. In any
5 event --

6 MR. LANIER: We will see to it, your Honor.

7 THE COURT: OK.

8 MR. RUBIN: Your Honor, a point of clarification?

9 THE COURT: Yes.

10 MR. RUBIN: With respect to the meeting that your
11 Honor is encouraging of the advertiser class, do you mean to
12 include the Surefreight in re consolidated cases together with
13 all the other cases that have advertiser class plaintiffs? Do
14 I understand that correctly, your Honor?

15 THE COURT: Yes. Well, there are three of them.
16 There's SPX and Skinny with one counsel for that. There's
17 Cliffy Care and there's Surefreight. That's three, so it's not
18 yet a totally unmanageable number. All right?

19 MR. RUBIN: Thank you, your Honor.

20 THE COURT: But wholly apart from the big meeting, I'm
21 charging counsel in the three advertiser class actions to meet
22 and confer.

23 Yes, sir.

24 MR. GRZENCZYK: For the Surefreight class, your Honor,
25 that sounds great to us. I think it's been conveyed in our

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1 letter response to PT01, we're happy to try and work with and
2 create a consolidated group along with the other advertiser
3 classes.

4 I would note that in the Surefreight case we've
5 previously served Rule 34 requests, so we'll distribute those
6 to everyone else --

7 THE COURT: That's great.

8 MR. GRZENCZYK: -- to try and facilitate this
9 discussion of how this might get revised, reflected, and
10 received and used.

11 THE COURT: That's great. That sounds terrific.

12 Mr. Isquith.

13 MR. ISQUITH JR.: For SPX, your Honor, we're happy to
14 meet and confer with our colleagues and hopefully work out the
15 differences in our classes because we do note there are some
16 significant differences in the classes and we'll do our best to
17 work together.

18 THE COURT: Yes. You might all have noticed that it's
19 not often that there are overlapping classes certified by the
20 same judge.

21 MR. GRZENCZYK: This is not the first time we've been
22 in this situation and we've been able to work it out in past
23 cases.

24 THE COURT: Right.

25 MR. GRZENCZYK: I'm sure we can figure it out here.

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1 THE COURT: Well, that's what I'm hoping. That's good
2 news.

3 Now, I have to talk about Associated Newspapers.

4 This is not directed to any individual personally.
5 This is tough stuff, but there is a real issue here in that
6 counsel for Associated Newspapers has a complaint filed against
7 Google. It was the one case that I had at the outset, and I
8 happen to have read your complaint. All right?

9 And it's not your fault, but it takes some time to get
10 through it. It's not easy stuff to pick up on the first read,
11 and I assume that will be true with most of the other
12 complaints just because it's unfamiliar technology to me.

13 But from the submissions I have, it is the case that
14 right now, today, the law firm represents Facebook in a matter
15 involving the FTC, and this is not something that gets
16 evaluated under the rules of professional responsibility as a
17 former client under Judge Weinfeld's substantial relationship
18 test. This is a present representation, and there may be
19 serious issues on duty of loyalty.

20 Duty of loyalty to the Daily Mail or Associated
21 Newspapers, whatever it's called, may require you to recommend
22 asserting a claim against Facebook, but you can't do that
23 because that's your present client. There may be discovery
24 sought of Facebook. There may be joint prosecution meetings in
25 which strategy is discussed about how to most effectively build

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1 a case against Facebook. And I just don't see how this can
2 happen with the presence of a law firm that, as we speak,
3 represents Facebook.

4 Care to comment?

5 MR. THORNE: Yes, your Honor. Thank you, Judge.

6 To start with the premise you start with, we do
7 represent -- my partner, Mark Hansen, represents Facebook in
8 the -- (inaudible)

9 THE COURT: I'll tell you what. I'm going to have you
10 come down and I'm going to invite you go to the podium there.
11 There's a microphone, and I'll be able to hear you.

12 Go ahead.

13 MR. THORNE: Thank you, your Honor.

14 Can you hear me now?

15 THE COURT: Yes, but you still have to keep your voice
16 up.

17 MR. THORNE: Got it.

18 THE COURT: You can take your mask off inside.

19 Thank you.

20 MR. THORNE: That's the best news I've had this
21 morning, your Honor.

22 We do represent Facebook. My partner, Mark Hansen,
23 represents Facebook vis-à-vis the Federal Trade Commission in
24 different claims. Daily Mail did an extensive pre-complaint
25 investigation of its claims. Facebook is actually a good

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1 partner of Daily Mail's in the sense that it's the way Daily
2 Mail gets advertising and content out.

3 Daily Mail has made a choice to bring a case against
4 Google, and that's what we're pursuing. We have a different
5 level of investment in this case than some of the other
6 parties. Daily Mail is not going to be satisfied, and I think
7 the other large publishers that will likely be filing
8 separately will not want to be represented by the very small
9 publishers because the large and small publishers have
10 different issues.

11 If we ever got to a point where Daily Mail wanted to
12 bring a case against Facebook, I would not be a part of that.
13 But as a deeply invested party in this thing, we've spent close
14 to a million dollars on expert fees, so we have huge legal fees
15 investigating and developing this case, working with Texas,
16 working with the Department of Justice in the cases that they
17 have brought or are developing. We really can't sit still or
18 go on the sidelines. For Daily Mail once the arrangement is
19 got, it has no claim against Facebook.

20 THE COURT: Well, should I let you into a joint
21 prosecution meeting to discuss how to nail Facebook?

22 MR. THORNE: Your Honor, if there's a joint
23 prosecution meeting that can be run like a board meeting, where
24 one board member sometimes steps out for the parts that are
25 going to be conflicted, I think this could still work. I would

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1 actually invite Mr. Lanier, Mr. Boies, others to comment
2 whether they think -- to date we have done a lot of work
3 together. This is not like two people that you're marrying for
4 the first time in a blind marriage. This has been a
5 relationship bringing these cases over the last few years.

6 THE COURT: This is what I'm going to require you to
7 do, to brief why there is not, in your view, a present conflict
8 and why it would not be a conflict for you to participate in
9 group meetings. It's very unwieldy in cases in which both
10 Google and Facebook are both defendants -- and there are a
11 number of cases pending before me -- to have you, as Facebook's
12 lawyer, sit in the room. I don't know how that would work, but
13 I'm going to give you an opportunity to lay that out, and I
14 would want your letter in -- would it be convenient to do it in
15 a week?

16 MR. THORNE: Yes, your Honor.

17 THE COURT: OK. And I'll give anybody else who wants
18 to comment, including specifically Facebook, as well as members
19 of the plaintiffs' side here an opportunity to respond.

20 Now, it wouldn't surprise me if Facebook said, We
21 think it's a great idea for them to stay in the case, two
22 thumbs up for Associated Newspapers' counsel staying in the
23 case. I'm not accusing anybody of acting in bad faith or being
24 cute here, but it is an odd lineup. It's a tough situation,
25 and I don't have the solution or answer as to how you get

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1 walled off in meetings.

2 MR. THORNE: All right. Well, thank you, your Honor.

3 THE COURT: Thank you.

4 All right. The final issue I have is what I'll call
5 the redaction issue. I have the briefing from Google. There
6 are two affidavits or declarations that have been submitted,
7 and while anybody else has the opportunity to be heard, I know
8 there have been, I guess if you want to call them sort of *amici*
9 who have weighed in, and the state has weighed in, but if
10 anybody has any substantive arguments, this is the time to get
11 me a letter brief, because I'm going to rule on that shortly.

12 Sir.

13 MR. KOROLOGOS: Your Honor, I would ask that
14 regardless of what redactions might be made public in the final
15 ruling that your Honor's considering, that the parties here,
16 all of the plaintiffs, be permitted to see the state's case in
17 its entirety.

18 THE COURT: That will happen when the protective order
19 is entered, in all events. In all events, once the protective
20 order is entered -- it may be that you'll see it before then on
21 the docket. But to the extent you don't or you don't see all
22 of it, that's a reasonable request, and I'm going to do that.

23 MR. KOROLOGOS: Thank you, your Honor.

24 THE COURT: All right. And now I ask what else?

25 Mr. Lanier.

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1 MR. LANIER: Your Honor, I'm remiss if I don't
2 appreciate the Court and your staff because you all jettisoned
3 this forward because I'm in trial right now in Cleveland, and I
4 appreciate it very much, that I could be here. Thank you very
5 much.

6 THE COURT: All right. Happy to do that.

7 MR. GRZENCZYK: Your Honor, in the case before Judge
8 Freeman with the publishers and the advertiser class there, we
9 had entered a time and expense protocol, which mostly applies
10 to the class action reports.

11 THE COURT: I saw it. That's going to remain in place
12 except for one unusual modification. You need not file reports
13 with the Court.

14 MR. GRZENCZYK: Understood.

15 THE COURT: But you should hold on to your reports,
16 because I sure will be asking for them if there is someday a
17 fee application. If there is ever a fee application, I will
18 say you were ordered to compile these reports, now where are
19 they?

20 MR. GRZENCZYK: In the event that day happens, we will
21 be prepared to provide the Court with whatever -- would you
22 like us to submit a revised proposed order for this action and
23 with this case's docket for your Honor to sign off on?

24 THE COURT: That would be fine. That would be great.

25 MR. GRZENCZYK: OK.

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1 THE COURT: Thank you. Anything else, sir?

2 MR. GRZENCZYK: No. That's all, your Honor.

3 THE COURT: Thank you.

4 MR. GRZENCZYK: Just that housekeeping.

5 THE COURT: Ma'am.

6 MS. COSLETT: Your Honor, I was just going to say
7 that, you know, we think we will work with the other class
8 plaintiffs, but we might revise slightly the time and expense
9 report, protocol expense.

10 THE COURT: On the time.

11 MS. COSLETT: Yes, your Honor.

12 THE COURT: That's fine. Talk to each other.

13 MS. COSLETT: Yes. Yes, your Honor.

14 THE COURT: Circulate it and submit it, and when you
15 submit it, I'll let it sit on my desk for a few days to see if
16 I get any comments from anyone.

17 MS. COSLETT: Thank you, your Honor.

18 THE COURT: What else?

19 That's remarkable. Nothing else to talk about? All
20 right. That's a good start.

21 I appreciate everybody coming in. There's a lot of
22 work to be done all around, and I thank you.

23 We are adjourned.

24 (Adjourned)

25